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ROKIAH MHD NOOR v. MENTERI PERDAGANGAN DALAM NEGERI, KOPERASI & KEPENGGUNAAN MALAYSIA & ORS AND ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEALS NO: W-01(A)-67-03-2015 & W-01(A)-68-03-2015]
29 JUNE 2016

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CIVIL PROCEDURE: *Appeal – Appeal to Court of Appeal – Appellants co-authored letter that caused negative impression on Companies Commission of Malaysia – Disciplinary proceedings – Dismissal and demotion of appellants – Whether disciplinary committee complied with Statutory Bodies (Discipline And Surcharge) Act 2000 – Whether appellants entitled to protection accorded by s. 10(1)*

D

of Whistleblowers Protection Act 2010 – Whether appeal ought to be allowed

ADMINISTRATIVE LAW: *Judicial review – Dismissal of – Appeal against dismissal of judicial review – Appellants co-authored letter that caused negative impression on Companies Commission of Malaysia – Disciplinary proceedings – Dismissal and demotion of appellants – Whether disciplinary committee complied*

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with Statutory Bodies (Discipline And Surcharge) Act 2000 – Whether appellants entitled to protection accorded by s. 10(1) of Whistleblowers Protection Act 2010 – Whether appeal ought to be allowed

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The Deputy Chief Executive Officer (Operations) of the Companies Commission of Malaysia ('CCM'), known as Rokiah, and the Director of Training Academy of CCM, known as Azryain, were both alleged to have co-authored a letter to third parties including the Prime Minister and the Deputy Prime Minister which contained a series of scurrilous and damaging allegations against CCM. The case against Rokiah and Azryain by the Disciplinary Committee of the CCM was that Rokiah and Azryain had

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conducted themselves in a manner that brought CCM into disrepute or discredit to CCM or alternatively, that they had acted in an irresponsible manner. At the conclusion of the disciplinary proceedings, both Rokiah and Azryain were found guilty. Rokiah's contract of service was terminated under s. 8(4) of the Statutory Bodies (Discipline And Surcharge) Act 2000

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('the SBA') and her appointment as Deputy Chief Executive Officer (Operations) of CCM was revoked by the Minister of Domestic Trade, Cooperatives and Consumerism ('the Minister') pursuant to s. 11(1)(b) of the Companies Commission Act 2001 ('the CCM Act') whilst Azryain was demoted by one grade by the Disciplinary Committee. Rokiah and Azryain's

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application for judicial review to quash the respective decisions against them was dismissed by the High Court. Hence, the present appeals. The main complaint by Rokiah and Azryain related to the procedural impropriety of

the disciplinary process, that they were not given a right of hearing before the Disciplinary Committee decided that a *prima facie* case had been made out against them and that the disciplinary action taken against them contravened s. 10(1) of the Whistleblowers Protection Act 2010 ('WPA'). A

Held (dismissing appeals with costs)
Per Abdul Rahman Sebli JCA delivering the judgment of the court: B

(1) The law is trite that the courts are slow to interfere with the findings of a disciplinary proceeding. A decision of a public body is only liable to be quashed if it amounts to an absurd or perverse decision that is devoid of factual or evidential foundation. From the chronology of events, CCM had followed all the steps required by the SBA before finding both Rokiah and Azryain guilty of the charges. (paras 8-10) C

(2) A statutory body is not obliged to discharge functions beyond those prescribed by the statute. Having regard to the principles involved, the JC was not wrong in dismissing Rokiah's and Azryain's application for a review of the CCM's decision. The charges against them were sufficiently clear and they had no difficulty in responding to the allegations and had furnished extensive representations in their defence to the charges. They had been given every opportunity to correct or contradict the allegations of facts as set out in the charges. (paras 17 & 20) D E

(3) In disciplinary proceedings, a *prima facie* case means a case which, on the face of it, discloses a breach of discipline. Whether or not a *prima facie* case had been made out is entirely for the Disciplinary Committee of CCM to decide pursuant to reg. 35(1). The court should not step into the shoes of the Disciplinary Committee in making such determination. The Companies Commission of Malaysia must consider all the relevant facts before preferring any disciplinary charge against them. There was also nothing in the provisions that could be construed as requiring CCM to give Rokiah and Azryain such right of hearing. (paras 23, 24 & 26) F G

(4) To seek protection under the WPA, the person disclosing the improper conduct must make the disclosure only to any of these enforcement agencies and to no others. In the present case, Rokiah and Azryain did not qualify as whistleblowers as other than disclosing the alleged improper conduct to members of CCM and the Anti-Corruption Commission, the disclosure was also made to third parties, none of whom is an 'enforcement agency' within the meaning of s. 2 of the WPA. As both Rokiah and Azryain did not qualify as whistleblowers within the meaning of the WPA, they were not entitled to the protection accorded by s. 10(1) of the WPA. (paras 33 & 35) H I

A ***Bahasa Malaysia*** *Headnotes*

Timbalan Ketua Pegawai Eksekutif (Operasi) Suruhanjaya Syarikat Malaysia ('SSM'), yang dikenali sebagai Rokiah, dan Pengarah Akademi Latihan SSM, yang dikenali sebagai Azryain, didakwa bersama-sama mengarang sepucuk surat kepada pihak ketiga termasuk Perdana Menteri dan Timbalan Perdana
B Menteri yang bersifat biadab dan mengandungi dakwaan-dakwaan yang memudaratkan SSM. Kes terhadap Rokiah dan Azryain oleh Jawatankuasa Tatatertib SSM adalah bahawa Rokiah dan Azryain bertindak secara yang boleh membawa nama buruk kepada SSM atau mencemarkan nama SSM atau secara alternatif, bahawa mereka bertindak dengan cara tidak
C bertanggungjawab. Di akhir prosiding tatatertib, kedua-dua Rokiah dan Azryain didapati bersalah. Kontrak perkhidmatan Rokiah ditamatkan di bawah s. 8(4) Akta Badan-Badan Berkanun (Tatatertib Dan Surcaj) 2000 ('ABB') dan pelantikannya sebagai Timbalan Ketua Pegawai Eksekutif (Operasi) SSM dibatalkan oleh Menteri Perdagangan Dalam Negeri,
D Koperasi dan Kepenggunaan ('Menteri') menurut s. 11(1)(b) Akta Suruhanjaya Syarikat 2001 ('Akta SSM') manakala Azryain diturunkan pangkat satu gred oleh Jawatankuasa Tatatertib. Permohonan Rokiah dan Azryain untuk semakan kehakiman bagi membatalkan keputusan terhadap mereka ditolak oleh Mahkamah Tinggi. Oleh itu, rayuan ini. Aduan utama
E Rokiah dan Azryain adalah berkaitan dengan ketidakwajaran prosedur proses disiplin, di mana mereka tidak diberi hak perbicaraan sebelum Jawatankuasa Disiplin memutuskan bahawa kes *prima facie* dibuktikan terhadap mereka dan tindakan tatatertib yang diambil terhadap mereka melanggar peruntukan s. 10(1) Akta Perlindungan Pemberi Maklumat 2010 ('APPM').

F **Diputuskan (menolak rayuan-rayuan dengan kos)**
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Adalah undang-undang mantap bahawa mahkamah akan berhati-hati dalam mengganggu dapatan prosiding tatatertib. Keputusan sesuatu pertubuhan awam hanya akan dibatalkan jika ia tidak masuk akal atau
G salah yang tidak mempunyai fakta asas atau keterangan. Dari kronologi peristiwa, SSM telah menuruti semua langkah-langkah yang diperlukan oleh ABB sebelum mendapati kedua-dua Rokiah dan Azryain bersalah atas tuduhan.

(2) Badan berkanun tidak diwajibkan menjalankan fungsinya di luar
H peruntukan statut. Dengan mengambil kira prinsip-prinsip yang terlibat, PK tidak terkhilaf apabila menolak permohonan Rokiah dan Azryain untuk mendapatkan semakan terhadap keputusan SSM. Tuduhan terhadap mereka cukup jelas dan mereka tidak mempunyai kesukaran untuk membalas dakwaan dan juga telah memberikan representasi
I menyeluruh dalam pembelaan mereka. Adalah jelas bahawa mereka diberi peluang untuk memperbetulkan atau menyangkal pernyataan fakta yang dinyatakan dalam pertuduhan.

(3) Dalam prosiding tatatertib, kes *prima facie* bermakna kes yang pada dasarnya mendedahkan pelanggaran disiplin. Terpulang kepada Jawatankuasa Tatatertib SSM untuk menentukan sama ada kes *prima facie* menurut per. 35(1) dibuktikan. Mahkamah tidak sepatutnya mengambil tempat Jawatankuasa Tatatertib dalam membuat penentuan tersebut. Suruhanjaya Syarikat Malaysia perlu mengambil kira semua fakta berkaitan sebelum mengenakan pertuduhan tatatertib terhadap mereka. Tiada apa-apa dalam peruntukan yang boleh ditafsirkan sebagai menghendaki SSM memberi Rokiah dan Azryain hak pendengaran.

(4) Untuk mendapatkan perlindungan di bawah APPM, seseorang yang mendedahkan kelakuan tidak wajar mesti membuat pendedahan tersebut hanya kepada mana-mana agensi penguatkuasaan dan bukan kepada orang lain. Dalam kes ini, Rokiah dan Azryain tidak melayakkan diri sebagai pemberi maklumat kerana selain daripada mendedahkan salah laku ahli SSM dan Suruhanjaya Anti Rasuah, pendedahan itu juga dibuat kepada pihak ketiga dan tiada seorang daripada mereka adalah 'agensi penguatkuasa' mengikut pengertian s. 2 daripada APPM. Oleh kerana kedua-dua Rokiah dan Azryain tidak melayakkan diri sebagai pemberi maklumat dalam pengertian APPM, mereka tidak berhak mendapat perlindungan di bawah s. 10(1) APPM.

Case(s) referred to:

Anandarajan & Ors v. Mahadevan [1971] 1 LNS 3 FC ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] 1 AC 374 ***(refd)***

Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 CA ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Harbhajan Singh v. Suruhanjaya Pasukan Polis Malaysia & Anor [2002] 4 CLJ 85 CA ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***

Lembaga Jurutera Malaysia v. Leong Pui Kun [2008] 6 CLJ 93 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Nicholas Langok Changkok v. Director General of Prisons & Ors [2001] 7 CLJ 429 HC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***

Ridge v. Baldwin [1964] AC 40 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

A *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***
Twist v. Randwick Municipal Council [1976] 12 ALR 379 ***(refd)***
Zakaria Abdul Rahman v. Ketua Polis Negara Malaysia & Anor [2001] 6 CLJ 273 HC ***(refd)***

B **Legislation referred to:**
Companies Commission of Malaysia Act 2001, s. 11(1)(b)
Statutory Bodies (Discipline And Surcharge) Act 2000, ss. 7, 8(4), Second Schedule regs. 32(1), 33(1), (2), 35(1), (2), (5), 36(1), 37, 39, 40
Whistleblower Protection Act 2010, ss. 2, 6(1), 8(1), (4), 10(1), (3)

C *For the appellant - Nurliny Che Soh & Ramesh Lachamanan; M/s Nurliny & Assocs*
For the 1st, 3rd & 4th respondents - Mazlifah Ayob & Natra Idris; SFCs
For the 2nd respondent - Steven Thiru & Gregory Das; M/s Shook Lin & Bok

Reported by Sandra Gabriel

D **JUDGMENT**

Abdul Rahman Sebli JCA:

[1] The core question in these appeals is whether the Disciplinary Committee of the Companies Commission of Malaysia ("CCM") had complied with the procedure laid down by the Statutory Bodies (Discipline And Surcharge) Act 2000 ("the SBA") in finding the appellants, Rokiah binti Mhd Noor ("Rokiah") and Azryain bin Borhan ("Azryain") guilty of the disciplinary offences they were charged with.

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[2] The salient facts are these. At the material time, Rokiah was the Deputy Chief Executive Officer of CCM whilst Azryain was Director of the Training Academy, CCM. The charge of misconduct leveled against them was that they had circulated a joint letter dated 25 October 2011 to third parties including the Prime Minister and the Deputy Prime Minister which contained a series of scurrilous and damaging allegations against CCM.

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G **[3]** CCM's case is that by circulating the letter to the third parties, Rokiah and Azryain had conducted themselves in a manner that brought CCM into disrepute or brought discredit to CCM or alternatively, that they had acted in an irresponsible manner. It was a long letter but the primary allegations made by Rokiah and Azryain in the letter were:

H (a) that there was a concerted effort amounting to "a conspiracy of the highest order" to have Zahrah Abdul Wahab Fenner (the Deputy Chief Executive Officer (Services) of CCM) ("Zahrah") appointed as the next Chief Executive Officer of CCM although she was not qualified to hold such position;

I (b) that Zahrah was lacking in integrity and was being investigated by the Anti Corruption Commission for several alleged transgressions involving overseas travels and procurements;

(c) that Zahrah had lied to the PM, the Government and the rakyat in respect of the MyCOID project that was being facilitated by CCM;

(d) that there was a high-level conspiracy to oust Datuk Redzuan Abdullah from his position as Senior Director of Enforcement at CCM in that a CCM member had gone to see the Attorney General and accused Datuk Redzuan Abdullah of failing to carry out his functions in CCM. The Attorney General became furious and issued instructions for all his secondees at CCM to be recalled;

(e) that Dato' Azmi Ariffin, the Chief Executive Officer of CCM connived with Zahrah and had condoned her wrongful acts and had interfered with the investigations carried out by the Anti Corruption Commission against Zahrah; and

(f) that Dato' Azmi Ariffin had been "entrapped" by Zahrah, making him tight-lipped and acting only as a spectator in allowing her to manipulate him and the CCM to her advantage.

[4] At the conclusion of the disciplinary proceedings, both Rokiah and Azryain were found guilty of the charges. Rokiah's contract of service was terminated under s. 8(4) of the SBA and her appointment as Deputy Chief Executive Officer (Operation) of CCM revoked by the Minister of Domestic Trade, Cooperatives and Consumerism ("the Minister") pursuant to s. 11(1)(b) of the Companies Commission of Malaysia Act 2001 ("the CCM Act") whilst Azryain was given the lesser punishment of demotion by one grade by the Disciplinary Committee.

[5] Rokiah and Azryain applied to the High Court for judicial review to quash the respective decisions against them. Both applications were dismissed on 27 January 2015, hence these appeals before us.

[6] It is the respondents' contention that the imposition of the disciplinary punishments on Rokiah and Azryain was entirely reasonable in the *Wednesbury* sense, an obvious reference to the principle laid down by Lord Greene MR in *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223.

[7] As the main complaint by Rokiah and Azryain relates to the procedural propriety of the disciplinary process, we think it is best that we set out at the outset the chronology of events leading their dismissal and demotion. The chronology is as follows:

(a) pursuant to reg. 33(1) of the Second Schedule to the SBA, the Chairman of the Disciplinary Committee on 12 March 2012 decided that the disciplinary offences committed by Rokiah and Azryain warranted a "Hukuman buang kerja atau turun pangkat" (dismissal or demotion).

(b) as a follow up to the decision, the matter was referred to the relevant Disciplinary Committee pursuant to reg. 33(2).

(c) in accordance with reg. 35(1) and (2), the Disciplinary Secretariat issued recommendation papers dated 5 April 2012 to the Disciplinary Committee on the issue of whether there was a *prima facie* case against Rokiah and Azryain.

(d) the Disciplinary Committee that convened on the same day decided that there was a *prima facie* case against Rokiah and Azryain.

(e) in accordance with reg. 40, CCM issued to Rokiah and Azryain letters of charges both dated 12 April 2012 which contained the charges of misconduct against them.

(f) pursuant to reg. 32(1), both Rokiah and Azryain exercised their right to be heard by issuing their respective written representations dated 24 May 2012.

(g) in accordance with reg. 36(1), on 28 June 2012, members of the investigation committee were appointed, comprising of individuals from the Ministry of Trade, Cooperatives and Consumerism.

(h) on the same day, the Chairman of the Disciplinary Committee decided to refer the cases to an investigation committee to obtain further clarification. The reference was made pursuant to reg. 35(5).

(i) on 23 July 2012, in accordance with reg. 37, Rokiah and Azryain were informed by the Chairman of the Disciplinary Committee that their cases had been referred to the investigation committee.

(j) on 24 September 2012, Rokiah and Azryain were informed that the investigation committee would hear their cases on 27 September 2012 and that the main focus of the hearing would be on the issue of "kenapa surat yang ditulis dan ditandatangani oleh tuan diedar kepada pihak ketiga" (why the letter written and signed by you was circulated to third parties). The appellants were also requested to bring at the hearing any document that would serve to justify their actions.

(k) the hearing of the investigation committee was conducted as scheduled on 27 September 2012. Both Rokiah and Azryain were given the opportunity to be heard at the hearing, in accordance with reg. 36 and reg. 37.

(l) at the conclusion of the hearing, the investigation committee produced a report of the hearing, in which it concluded that the circulation of the 25 October 2011 letter by Rokiah and Azryain to the third parties was not justified.

(m) in accordance with reg. 39, the Disciplinary Secretariat (Special Cases) on 19 October 2012 issued two recommendation papers to the Disciplinary Committee in respect of the investigation committee's report.

(n) the Disciplinary Committee met on 31 October 2012 to discuss the Disciplinary Secretariat's report. The Disciplinary Committee unanimously found both Rokiah and Azryain guilty of the charges and recommended Rokiah to be dismissed and Azryain to be demoted by one grade.

(o) the Disciplinary Committee's decision was communicated to Azryain by letter dated 9 November 2012. On the same day the Chairman of the Disciplinary Committee informed the Minister of the findings and recommendations of the committee in respect of Rokiah.

(p) pursuant to s. 11(1) of the CCM Act, the Minister by letter dated 28 November 2012 certified the recommendation for the termination of Rokiah's contract of employment and for her appointment as Deputy Chief Executive Officer (Operations) of CCM to be revoked with effect from 1 December 2012.

(q) pursuant to s. 7 of the SBA, Azryain appealed against the decision of the Disciplinary Committee by way of letter dated 30 November 2012 issued to the Disciplinary Appeals Committee. CCM requisitioned a meeting of the Disciplinary Appeals Committee on 8 January 2013 to determine Azryain's appeal.

(r) by letter dated 30 January 2013, the Disciplinary Appeals Committee communicated to Azryain that they had decided to maintain the decision made by the Disciplinary Committee.

[8] From the above chronology of events, it is clear that CCM had followed through all the steps required by the SBA before finding both Rokiah and Azryain guilty of the charges. Of relevance to note is that the statutory requirements in the disciplinary process are in *pari materia* with the Public Officers (Conduct and Discipline) Regulations 1993 which the apex court has consistently affirmed to be in accord with the concept of natural justice and procedural fairness: See *Ghazi bin Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525; [2001] 2 MLJ 417; *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573; [2008] 6 MLJ 1.

[9] The rule on natural justice as propounded by Lord Hodson in *Ridge v. Baldwin* [1964] AC 40 has long been applied in our courts ever since it was adopted by the Federal Court in *Anandarajan & Ors v. Mahadevan* [1971] 1 LNS 3; [1971] 2 MLJ 8. This is what Lord Hodson said in that case:

> No one, I think, disputes that three features of natural justice stand out - (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges.

[10] The law is trite that the courts are slow to interfere with the findings of a disciplinary authority: *Zakaria Abdul Rahman v. Ketua Polis Negara Malaysia & Anor* [2001] 6 CLJ 273; [2001] 3 MLJ 385; *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261. In *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 the then Supreme Court held that the decision of a public body is only liable to be quashed if it amounts to an absurd or perverse decision that is devoid of factual or evidential foundation. This is how Abdoolcader SCJ expressed his view in delivering the judgment on behalf of himself and on behalf of the Lord President at p. 279:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's task of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn Bhd v. Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 where in dealing with the question of reasonableness I alluded (at pp 129-130) to Lord Diplock's exegesis in *Bromley London Borough Council v. Greater London Council & Anor* [1983] 1 AC 768 (at p 821) in regard to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps be amiss to refer in this context to Dunn L.J.'s assertion in *Regina v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337 (at page 1352) that 'The categories of unreasonableness are not closed ...'.

[11] A decision of a public body may of course be challenged in a judicial review if such decision is infected by an "error of law": *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317. Error of law is committed if the decision suffers from illegality, irrationality, procedural impropriety and proportionality: *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374.

[12] As to the correct approach to be adopted by the court in dealing with cases of this nature, the decision of the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149 provides a useful guidance, where Mohd Ghazali Yusoff FCJ said:

> In the instant appeal, I am of the view that the trial judge and the Court of Appeal did not properly appreciate the facts and the applicable law to arrive at a judicious decision. From my reading of the judgments of the trial judge and the Court of Appeal, the approach taken, with respect, was as if the matter was a criminal case wherein the provisions of the Criminal Procedure Code and the Evidence Act 1950 would seem to apply. This approach is erroneous. It must be stressed that the courts cannot introduce technicalities of a court of law to the disciplinary authority. Further, courts do not normally regard it as their function to interfere with

the findings of fact by the disciplinary authority. In *R v. Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, Lord Diplock LJ said (at p. 488):

> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising *quasi*-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood of unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

[13] It was also decided in that case that the court can only exercise its powers of interference in a limited number of cases where it can be shown that the decision of the disciplinary authority is arbitrary or that it was a *mala fide* or colourable exercise of power.

[14] It is important to appreciate that a disciplinary proceeding before a disciplinary authority is not bound to follow the adversarial procedures of a court of law: See *Lembaga Jurutera Malaysia v. Leong Pui Kun* [2008] 6 CLJ 93; [2009] 2 MLJ 36 where Nik Hashim FCJ in disagreeing with the High Court that the respondent had a right to cross-examine the complainant said:

> The above legal propositions of the learned judge are flawed. They are in direct contrast with a long line of established Supreme Court, Federal Court and Court of Appeal authorities that hold that every administrative body is the master of its own procedure and need not assume the trappings of a court. The rules of natural justice do not contain any inalienable fundamental right to cross-examination of a witness, including the complainant (see *Disciplinary Tribunals* by JRS Forbes 1990 -- 115-121; *University of Ceylon v. EFW Fernando* [1960] 1 WLR (PC) p. 235). The rules of natural justice are variable and do not mean adversarial procedures of a court of law or analogous to a court of law.

[15] The learned judge went on to say at p. 129 (CLJ); p. 68 (MLJ):

> It is thus clear from the foregoing authorities that the disciplinary proceedings under section 15(2) of the Act are not adversarial proceedings. They are inquisitorial or investigatory proceedings and they are not inconsistent with the rules of natural justice (see *Jones v. Welsh Rugby Union* (The Times, 6 January 1998)). In such proceedings, questions such as the burden of proof, calling of witnesses or the need to explain the procedure do not arise in the same way in which they would in proceedings between parties in a suit, for such proceedings do not involve two opposing parties or adversaries before an independent adjudicator.

[16] In *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 the Federal Court reiterated that a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment not to review the punishment or penalty. This is what Peh Swee Chin FCJ said in delivering the judgment of the court:

> It cannot be denied further that the disciplining of a public officer by his department head, is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.
>
> Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government, is the best person to judge similarly the seriousness of misconduct of an employee.

[17] On the question of whether a statutory authority is obliged to discharge functions beyond those prescribed by the statute in question, courts in Malaysia have adopted the same position as in Australia, ie, that the statutory authority is not obliged to do so: See the decisions of this court in *Ganasan Marimuthu v. Public Services Commission & Anor* [1998] 4 CLJ 331 and *Harbhajan Singh v. Suruhanjaya Pasukan Polis Malaysia & Anor* [2002] 4 CLJ 85 and the decision of the Supreme Court in *Ghazi bin Mohd Sawi* (*supra*) all of which are in line with the decision of the High Court of Australia in *Twist v. Randwick Municipal Council* [1976] 12 ALR 379.

[18] In the *Utra Badi* case the Federal Court approved the following *dictum* of this court in *Ganasan Marimuthu*:

> The Privy Council as well as the Supreme Court has held that in employing the procedure prescribed in the General Order 26 and the former Reg. 30 of the General Orders, the requirements of fairness have been satisfied by the opportunity to make written representations to the deciding body. In all such cases, it has been held time and again by the highest courts in the land that written representations will suffice and that a fair hearing does not mean that there must be an opportunity to be heard orally by the officer in person or by his lawyer at the disciplinary authority stage. It is only at the committee of inquiry stage that an oral hearing, and with it the desirability or otherwise of legal representation, can be considered.

[19] In *Ghazi bin Mohd Sawi* Jemuri Serjan CJ (Borneo) said this in delivering the judgment of the court:

> In dealing with Ch. D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended.

> We would add that, in dealing with tribunals like the Police Commission, we should also guard ourselves from turning them into a court of law trying a criminal case, which they were not, and was never intended to be.

[20] On the facts of the present case and having regard to the principles involved, we do not see how it can possibly be argued that the learned Judicial Commissioner was plainly wrong in dismissing Rokiah's and Azryain's application for a review of CCM's decision. The charges against them were sufficiently clear and they had no difficulty in responding to the allegations and had in fact furnished extensive representations both written and oral in their defence to the charges. It is clear that they were given every opportunity to correct or contradict the allegations of fact as set out in the charges: *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 169.

[21] In their deliberations, the Disciplinary Committee and the Disciplinary Appeals Committee took into account the following factors which are clearly relevant to the charges:

(i) the 25 October 2011 letter tarnished and prejudiced the image of CCM and disrupted the harmony within the organisation;

(ii) the allegations contained in the 25 October 2011 letter were not supported by any and/or any solid evidence;

(iii) the appellants failed to use the proper channels and/or exhaust the internal complaints procedures to ventilate their concerns;

(iv) in such high position, Rokiah should assume full responsibility for her actions;

(v) the investigation committee held that there was no justification for the circulation of the 25 October 2011 letter to third parties; and

(vi) in the case of Azryain's appeal, the Disciplinary Appeals Committee noted that the Malaysian Anti-Corruption Commission had investigated the allegations contained in the 25 October 2011 letter and did not find any impropriety in the allegations.

[22] Rokiah and Azryain also complained that they were not given a right of hearing before the Disciplinary Committee decided that a *prima facie* case had been made out against them. The complaint is based on reg. 35(1) and (2) which stipulate as follows:

> (1) If it is determined under regulation 33 that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of dismissal or reduction in rank, the appropriate Disciplinary Committee to which the case is referred shall consider all the available information.

A (2) If it appears to the appropriate Disciplinary Committee that there exists a *prima facie* case against the officer, the appropriate Disciplinary Committee shall -

(a) direct that a charge containing the facts of the disciplinary offence alleged to have been committed by the officer and the grounds on which it is proposed to dismiss the officer or reduce his rank be sent to the officer; and

B

(b) call upon the officer to make, within a period of twenty-one days from the date he receives the charge, a written representation containing the grounds upon which he relies to exculpate himself.

C **[23]** With due respect, we have to say that there is nothing of substance in the point raised. In the first place there is nothing in the provisions that can be construed as requiring CCM to give Rokiah and Azryain such right of hearing at that stage of the proceedings.

[24] Whether or not a *prima facie* case had been made out was entirely for D the Disciplinary Committee of CCM to decide pursuant to reg. 35(1). The court should not step into the shoes of the Disciplinary Committee in making such determination. What is required of the Disciplinary Committee under reg. 35(1) is to consider "all the available information". That does not mean, by any stretch of the imagination, that a right of hearing must be accorded E to Rokiah and Azryain. All it means is that CCM must consider all the relevant facts before preferring any disciplinary charge against them.

[25] We should perhaps refer to the decision of Sulaiman Daud JC (later JCA) in *Nicholas Langok Changkok v. Director General of Prisons & Ors* [2001] 7 CLJ 429 which although not directly on point gives some idea as to what F information the disciplinary authority needs to have before deciding whether a *prima facie* case had been made out against the officer who is the subject of a disciplinary action. This is what the learned judge said:

> It is clearly stated therein that only the report of the incident was referred to the Disciplinary Board and that the board only considered that report G in finding that there is a *prima facie* case against the Plaintiff and deciding that a charge be framed against him. I did not find anything in the said Reg. 28 to require such report to be furnished to the Plaintiff. Sub-regulation (1) thereof only requires a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed grounds on which the officer is to be dismissed or H reduced in rank to be sent to the officer concerned.

[26] In the context of a disciplinary proceeding, a *prima facie* case means a case which on the face of it discloses a breach of discipline. Having regard to the contents of the 25 October 2011 letter, it is a long shot to suggest that I no reasonable disciplinary authority would have found a *prima facie* case against both Rokiah and Azryain.

[27] Rokiah and Azryain further contended that the disciplinary action taken against them contravened s. 10(1) of the Whistleblower Protection Act 2010 ("the WPA") which provides as follows:

> 10. (1) No person shall take detrimental action against a whistleblower or any person related to or associates with the whistleblower in reprisal for a disclosure of improper conduct.

[28] Under s. 2 of the WPA, a whistleblower is defined to mean any person who makes a disclosure of improper conduct to an enforcement agency under s. 6. "Improper conduct" on the other hand is defined to mean "any conduct which if proved, constitutes a disciplinary offence or a criminal offence".

[29] "Detrimental action" includes the following:

> (a) action causing injury, loss or damage;
>
> (b) intimidation or harassment;
>
> (c) interference in the lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person's employment, career, profession, trade or business or the taking of disciplinary action; and
>
> (d) a threat to take any of the actions referred to in paragraphs (a) to (c).

[30] Section 10(3) further provides:

> 10. (3) A person is deemed to take detrimental action against a whistleblower or any person related to or associated with the whistleblower if:
>
> (a) the person takes or threatens to take detrimental action because:
>
> (i) a whistleblower has made a disclosure of improper conduct; or
>
> (ii) the person believes that a whistleblower has made or intends to make a disclosure of improper conduct; or
>
> (b) the person incites or permits another person to take or threaten to take the detrimental action for any reason under subparagraph (a)(i) or (ii).

[31] To whom shall a person make a disclosure of improper conduct? The answer is in s. 6(1) of the WPA which provides as follows:

> 6. (1) A person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct:
>
> Provided that such disclosure is not specifically prohibited by any written law.

[32] As to who an "enforcement agency" is, s. 2 defines it to mean, unless the context otherwise requires, the following:

> (a) any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section, division, department or agency of such ministry, department, agency or body, conferred with investigation and enforcement functions by any written law or having investigation and enforcement powers;
>
> (b) a body established by a Federal law or State law which is conferred with investigation and enforcement functions by that Federal law or State law or any other written law; or
>
> (c) a unit, section, division, department or agency of a body established by Federal law or State law having investigation and enforcement functions.

[33] Therefore, to seek protection under the WPA, the person disclosing the improper conduct must make the disclosure only to any of these enforcement agencies and to no others. In the present case, clearly Rokiah and Azryain did not qualify as whistleblowers as other than disclosing the alleged improper conduct to members of CCM and the Anti-Corruption Commission, the disclosure was also made to the following third parties none of whom is an "enforcement agency" within the meaning of s. 2 of the WPA:

(i) the Prime Minister;

(ii) the Deputy Prime Minister;

(iii) the Minister of Domestic Trade, Cooperative and Consumerism; and

(iv) the Chief Secretary to the Government.

[34] Section 8(1) in fact prohibits a whistleblower from disclosing the confidential information or any part thereof in the course of an investigation into such disclosure. A contravention will subject the whistleblower to a criminal prosecution by virtue of s. 8(4).

[35] As both Rokiah and Azryain did not qualify as whistleblowers within the meaning of the WPA, they were not entitled to the protection accorded by s. 10(1) although the disclosures that they made in the 25 October 2011 letter fall squarely within the meaning of "improper conduct" and the disciplinary proceedings within the meaning of "detrimental action" under s. 2 of the WPA.

[36] For all these reasons, we dismissed both appeals with costs and affirmed the decision of the learned Judicial Commissioner.